Supreme Court, U.S.
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NO. 85-2015

In the Supreme Court of the United States

OCTOBER TERM, 1985

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner

V.

HARCON BARGE COMPANY, INC., D & G BOAT RENTALS, INC. AND THE M/V CHARLES D, TIDEWATER-VENICE, INC. AND THE M/V IBERVILLE, ARTHUR SMITH CORPORATION AND THE M/V I.C. HOSKINS AND CANAL BARGE COMPANY AND THE M/V MARIAN HAGESTAD
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF SERVICE

SUPPLEMENTAL APPENDIX A

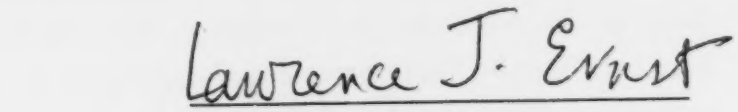
In accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, petitioner, Southern Pacific Transportation Company, lists its parent companies, subsidiaries, and affiliates, as follows: Southern Pacific Transportation Company is a wholly owned subsidiary of Santa Fe Southern Pacific Corporation. The parent company of Southern Pacific Transportation Company is Southern Pacific Company. The subsidiaries of Southern Pacific Transportation Company or of its wholly owned subsidiaries are as follows:

1. St. Louis Southwest Railroad Company
2. Northwest Pacific Railroad Company
3. Pacific Fruit Express Company
4. Evergreen Leasing Corporation
5. Southwest Town Lot Corporation
6. Southern Pacific Equipment Company
7. Visalia Electric Railroad Company
8. Los Angeles Union Terminal, Inc.
9. Southern Pacific Warehouse Company
10. Pacific Motor Trucking Company
11. Pacific Motor Transport Company
12. Louis Heller, Inc.
13. Southern Pacific Air Freight, Inc.
14. Southern Pacific International, Inc.

Affiliate companies of Southern Pacific Transportation Company are as follows:

1. Alton and Southern Railway Company
2. Central California Traction Company
3. Ogden Union Railway and Depot Company

4. Portland Terminal Railroad Company
5. Portland Traction Company
6. Sunset Railway Company
7. Harbor Belt Railway Trailer Train Company
8. St. Louis Southwest Railway Company
9. Arkansas and Memphis Railway Company
10. Southern Illinois and Missouri Bridge Company
11. Terminal Railway Association of St. Louis
12. Kansas City Terminal



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SUPPLEMENTAL APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION
SECTION S

HARCON BARGE COMPANY, INC.

VS. CIVIL ACTION NUMBER 791592

D & G BOAT RENTALS, INC.

SOUTHERN PACIFIC TRANSPORTATION CO.

VS. CIVIL ACTION NUMBER 800511

M/V I. C. HOSKINS, ET AL

SOUTHERN PACIFIC TRANSPORTATION CO.

VS. CIVIL ACTION NUMBER 800512

M/V IBERVILLE, ET AL

SOUTHERN PACIFIC TRANSPORTATION CO.

VS. CIVIL ACTION NUMBER 800513

M/V CHARLES D, ET AL

SOUTHERN PACIFIC TRANSPORTATION CO.

VS. CIVIL ACTION NUMBER 800514

M/V MARIAN HAGESTAD, ET AL

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OPINION

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

Four of the five consolidated cases herein involve collisions in April, and May, of 1979, whereby tugs pushing barges and a light boat struck the northeast dolphin or hydrocushion of the Southern Pacific Railroad Bridge at Berwick, Louisiana. The other consolidated case came about as the result of the sinking of one of the barges due to the first collision. As the testimony of a number of the same witnesses was essential in two or more of the cases, consolidation of all was the logical solution.

The existing bridge was constructed in 1972, with an opening of 320 feet for navigation. The northeast section initially had a fixed structure to protect the railroad bridge from collisions with vessels and after its destruction, the dolphin was changed in 1973, to include a suspended ring of concrete which was rebuilt in 1974, after another collision. This movable type dolphin was superior to the old fixed structure and was unquestionably an advancement of the art. It was cheaper to construct and did a better job than the old protective system. There were several vessel collisions with the dolphin from 1974 to 1979, prior to the collisions involved herein, the most serious being the National Goal collision on January 14, 1979. The dolphin was then repaired at a cost of approximately $59,000.00 in February of 1979, and although it was struck again in March of 1979, the evidence is clear that it was in good condition and not in need of repair at the time of the first collision in these consolidated cases.

The dolphin is constructed of nine fixed steel pilings driven into the riverbed, and placed in a circular pattern with one piling in the center. The piling cluster is welded

together near its top, on top of which is mounted a wagon wheel which will turn upon contact. The concrete ring is suspended from eight metal hangers attached to the wagon wheel. The dolphin's ring of concrete resembles a donut sliced into four sections which is held together by steel joints. With each concrete section weighing approximately 100 tons, it is more feasible to assemble the ring in sections than as an integral member. Although the concrete ring is allowed to move, there is a limit. Once it is pushed to the limit of its mobility, which is against the steel pile superstructure, it will deform the structure itself if the force is continued. However, this does not appear to be the case herein as none of the collisions involved caused any damage to the pilings, which was confirmed by an underwater inspection in June of 1979. Southern Pacific claims that as a result of the four collisions it suffered damage to its dolphin system in the amount of $324,400.00, and that is has been unable to segregate the particular damage resulting from any one collision.

Harcon Barge has sued the Southern Pacific for the sinking of its barge, the RT 407, alleging that a padeye on the dolphin protruded into the navigable waterway, cutting a gash in the starboard side of the RT 407 when it was driven against the dolphin by the M/V Charles D in the first collision. Harcon has settled with the Charles D and reserved its rights against the Southern Pacific.

The defendant, M/V Iberville, asserted a third party complaint against the United States of America on the ground that the Coast Guard negligently directed the M/V

Iberville to proceed downstream through the bridge at the same time it directed another barge and pushboat to proceed upstream through the bridge, thereby forcing the M/V Iberville to reverse its engines in an attempt to avoid a collision with the oncoming vessel and/or the bridge or its dolphin, but despite its every effort to do so, the M/V Iberville was carried by the dangerously swift current of the Atchafalya River into the northeast dolphin of the bridge. The U.S.A. has been dismissed for reasons hereinafter set forth.

Harcon Barge Company, Inc. V. D & G Boat Rentals, et al
Findings of Fact

1.

The Charles D incident occurred on April 7, 1979, at 11:50 p.m. as the M/V Charles D was proceeding downriver pushing the RT 407 and AD 17, two 195' barges loaded with limestone. The RT 407 and AD 17 were inland river open hopper barges attached together at the box end with the AD 17 leading at the time of the collision. The barges had been loaded with limestone approximately one week earlier at Paducah, Kentucky, and at the last measurement at Bayou Sorrell Locks averaged 2.8' of free board. The RT 407 had been inspected prior to loading at Paducah, which inspection revealed no holes nor visible cracks or creases, and had a normal level of water in its inner compartments. The barge was twenty years old and capable of navigation when it left Paducah.

2.

The Charles D lost control and began to angle downriver near the railroad bridge at Morgan City, Louisiana, and the second barge in tow, the RT 407, aft end forward, struck the northeast hydrocushion at a northwesterly point on the channel side of the dolphin. The barge dragged along the side of the dolphin for nearly half the length of its starboard side before clearing the dolphin and regaining the channel. After the accident, the barge had a ½"-¾" crease, or scratch, in it 85' long along the starboard side, approximately 15" below the deck beginning 42' aft of stern and continuing 17' before evidencing a gouged area of 8' along the #2 starboard wing compartment, the scratch then continuing 60' more toward the bow at a slight descending angle. Although Southern Pacific contends the crease was caused either prior to or after the accident in a manner unrelated to the barge's contact with the dolphin, the Court is convinced by a preponderance of the evidence that the ½"-¾" crease was caused by a protruding padeye on the hydrocushion.

3.

The dolphin had an anti-sparking protection device consisting of autombile tires suspended by cables, the cables attached to the dolphin through two sets of padeyes, one of the channel side and the other upriver, protruding 3" beyond the dolphin's surface. The padeyes are made of ½" plate steel and are spaced at 2' intervals starting 9" from the top of the dolphin. At issue here are the padeyes found at a northwest point on the channel side of the dolphin.

4.

Southern Pacific designed the anti-sparking device to satisfy Coast Guard requirements for a spark-free surface on the northwest side of the dolphin, where it is vulnerable to impact from vessels navigating downriver. The plans submitted by Southern Pacific for Coast Guard approval, however, did not show the padeyes either on the channel side, nor on the upriver side of the dolphin where the second set is found. The Coast Guard approved the tire arrangement as an anti-sparking device but did not authorize the padeyes by the permit issued to Southern Pacific in 1973, for construction of the dolphin.

5.

Although the automobile tire arrangement was adequate, the Court finds that the padeyes used to attach the cables to the dolphin presented a danger to navigation. Vessels frequently lose control and strike the hydrocushion at this point of the river, and, as herein, can be seriously damaged by the protruding metal.

6.

The evidence overwhelmingly preponderates in favor of the Court's conclusion that the padeye protrusion caused the gash in the side of the RT 407. Testimony established that the starboard side of the barge scraped along the northwest section of the hydrocushion for the greater half of its length. The ½"-¾" scrape found on the RT 407 after the collision matched perfectly the ½" thickness of the padeye. The gash and the penetration appeared in a

continuous line and appeared to have been caused by a sharp or hard object and by one incident. Rust discoloration evidenced that the scratch was of recent vintage when the barge was drydocked in August of 1979. Further, evidence established that if the dolphin were pushed to its limit upon impact, it is probable that only one mark would have been scratched on the barge, rather than several at 2' intervals, and that the scratch mark would appear in a straight line rather than one which would have appeared jagged, arcked or broken had the dolphin been moving.

7.

Evidence does not support defendant's contention that the gash resulted from a weld fracture, which would have been visually apparent upon inspection in drydock after the sinking. The Court also rejects any contention that the scratch and the gouged area might have been caused when the RT 407 was still moored at Paducah, or after the accident, either before mooring, during, or in the course of salvage operations, as there is no evidence in support thereof.

8.

Upon impact with the hydrocushion the lead barge, AD 17, broke out of tow and when it was recaptured was tied along the starboard side of the RT 407 for mooring across from the D & G Boat Yard, while the M/V Charles D was drydocked for scheduled repairs. D & G personnel performed three walkaround inspections, one immediately following the accident and two the following day, in the morning and early afternoon, which revealed no holes in

the barge and that the RT 407 was not taking on water. No one ever separated the AD 17 from the RT 407 to examine the starboard side of the RT 407 damages. D & G did not post a watch over the two barges. At about 1:30 p.m. on the afternoon of April 9, approximately thirty-six hours after the accident, the barge had developed a serious starboard list and sank.

9.

The court concludes from a preponderance of the evidence that the barge sank as a direct result of its taking on water through the gouged area opening into the #2 starboard wing compartment. A starboard list due to shifting cargo combined with water collected in the cargo space or the hull lessened the freeboard on the damaged side, and the Court finds that the hole was less than 17" above the waterline when the barge was moored*, where wave wash caused by heavy river traffic lapped up between the RT 407 and AD 17 causing water to enter the barge and gradually sink it.

10.

It is apparent to the Court that D & G Boat Rentals personnel performed inadequate inspections of the barge, at best. The collision with the dolphin was severe enough to have put D & G personnel on notice of possible hull damage; the gash was above the waterline and would have

*With 2.8' of freeboard the gouged area, 15" below the deck, would have been 17" above the water line.

been visible had the crew checked for exterior damage to the hull. Additionally, inspections would have revealed that the RT 407 was taking on water in time enough for the barge to be saved, had the crew check more thoroughly, or more frequently.

11.

Although disputed, the Court finds that the RT 407 was in good condition in April of 1979, and that its fair market value at the time was $105,000.000. The parties stipulated that the RT 407 was a constructive total loss.

12.

The parties also stipulated that Harcon Barge Company sustained damages in the amount of $111,296.75 in salvage, miscellaneous expenses and cargo loss.

Conclusions of Law

1.

This matter falls within the admiralty and maritime jursidiction of the Court, 28 U.S.C. § 1333.

2.

The Court finds that D & G Boat Rentals was negligent in striking the northeast dolphin, which con-

tributed ultimately to the ruination of the RT 407.* There is no evidence that the collision was caused by an act of God nor by any fault on the part of defendant, Southern Pacific. The collision was a direct result of the M/V Charles D captain's failure to maintain proper control of the vessel, and proximately caused the RT 407 to sink.

3.

Although not at fault in causing the collision, Southern Pacific's negligence was also a proximate cause of damage suffered by Harcon Barge. Southern Pacific knew or should have known that the placement of the padeyes on the channel side of the dolphin presented a serious risk of harm to vessels in navigation. The dolphin system was designed by the railroad to withstand the impact of collisions; Southern Pacific cannot now contend it was not foreseeable that a moving vessel would strike the hydrocushion and be damaged by the protruding metal. The Court concludes that Southern Pacific was negligent in constructing and maintaining the padeyes on the exposed side of the dolphin and that this negligence contributed to the sinking of the RT 407.*

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*Possession and control of the RT 407 was turned over to D & G Boat Rentals by the Harcon Barge Company. Therefore, any negligent acts on the part of D & G causing damage to the RT 407 cannot be attributed to Harcon Barge.

*Because the Court has found that Southern Pacific was negligent in constructing and maintaining the padeyes, there is no need to address the applicability of the Pennsylvania rule.

4.

D & G Boat Rentals' failure to adequately inspect the RT 407 following the collision also constitutes negligence and was a concurrent cause of damage to the RT 407. D & G personnel should have more thoroughly inspected the exterior of the hull as well as the interior compartments to avoid the foreseeable consequences of the barge taking on water and sinking.

5.

The rule in admiralty is that when two or more parties have contributed by their fault to cause property damage in a maritime collision, liability for such damage is to be allocated proportionately to the comparative degree of their fault. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 44 L.Ed.2d 251, 95 S.Ct. 1708 (1975). If a negligent party has settled the Court may still consider that party's negligence in the allocation of damages. *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979). The Court has determined that the concurrent fault by D & G Boat Rentals and Southern Pacific Transportation Company contributed to the sinking of the RT 407 and allocates liability against each in the following proportions: Ninety (90%) per cent against D & G Boat Rentals, and ten (10%) per cent against Southern Pacific.

6.

Southern Pacific is liable to Harcon Barge Company for a total of ten (10%) per cent of the fair market value of the RT 407 in April, 1979, and of the damages sustained by

Harcon Barge as a result of the sinking in salvage, miscellaneous expenses, and cargo loss, or $21,629.68.

7.

Southern Pacific argues that since the RT 407 was a constructive total loss, that it should not be cast in damages for the cost of salvage, which was slightly less than the fair market value of the barge at the time of its sinking. The argument is without merit. 33 U.S.C. § 409, referred to as the Wreck Act, imposes a duty on the owner of a sunken craft to remove it from navigable channels, or to abandon it and subject it to removal by the United States. Jurisprudence has left the choice to the owner:

> "The owner of a vessel sunk without any negligence on his part is still subject to the statutory obligation to remove the wreck, but is given an option: he may either raise the vessel himself and seek recovery of the expenses from the party responsible for the sinking, or he may abandon the vessel and allow the United States to bear the burden of removal and recovery of expenses from the negligent party." *St. Paul Fire & Marine Ins. v. Vest Transp.*, 666 F.2d 932, 940 (5th Cir. 1982).

Harcon Barge Company was fulfilling its statutory obligation in removing the RT 407 from the river, and may proceed against the negligent parties for the cost of salvage. Southern Pacific is liable for its proportionate allocation of negligence, as discussed above.

8.

Plaintiff, Harcon Barge, is entitled to an award of prejudgment interest of 9.07% from April 9, 1979, when the RT 407 sank. The Court has not found "peculiar circumstances" which would justify a denial prejudgment interest or make it inequitable for the defendant to be forced to pay it. *Pluyer v. Mitsui O.S.K. Lines,* 664, F.2d 1243 (5th Cir. 1982); *Ceja v. Mike Hooks, Inc.,* 690 F.2d 1191 (5th Cir. 1982).

Southern Pacific Transportation Co. V.
M/V I. C. Hoskins, et al
Southern Pacific Transportation Co. V.
M/V Iberville, et al
Southern Pacific Transportation Co. V.
M/V Charles D, et al
Southern Pacific Transportation Co. V.
M/V Marian Hagestad, et al

Findings of Fact

1.

The M/V Charles D's tow, the barge RT 407, struck the hydrocushion on April 7, 1979, near midnight in the first of these consolidated collisions. The Court finds that the collision caused substantial damage to the concrete around the joints and to the hangars. All bolts were bent to some degree, two of these severely. The concrete was chipped or cracking in some places. No survey was conducted, however, to determine the amount or extent of damages after the Charles D collision.

2.

On April 25, 1979, at 12:20 p.m., the M/V Iberville, a Tidewater Venice, Inc. 185' bridge supply vessel (a light boat), carrying no cargo, hit the hydrocushion port side midships, denting the bump rail on the vessel and knocking a chip of concrete off the dolphin approximately 3'-4' wide and 2½' high. The M/V Iberville had been holding in idle above the railroad bridge in order to let a northbound vessel and its tow clear the railroad bridge, and the Iberville got into a position where the current was too swift for it to maintain its position.

3.

The United States Coast Guard maintains a Vessel Traffic Service (VTS) at the railroad bridge to assist vessels in the safe navigation of the bridge. Tidewater Venice, Inc. filed a third party demand against the United States on June 29, 1981, alleging that the Coast Guard VTS operator had failed to inform the captain of the M/V Iberville of the northbound vessel in time enough for him to hold back. Captain Thibodeaux of the M/V Iberville testified that he had tried to establish contact with VTS but the radio channels were busy and that once he made contact, the VTS operator instructed him to proceed downriver through the railroad bridge. The Court however, noted the absence of a customary entry in the ship's log to this effect. Further, the VTS operator testified that the first notice he had of the proximity of the vessel was upon viewing it above the highway bridge, and that he immediately contacted the Iberville captain to inform him of the northbound vessel.

4.

The Court finds that, in accordance with Coast Guard regulations, it was incumbent on the M/V Iberville to contact the VTS before attempting to transit the bridge area, and that Captain Thibodeaux failed to do so. The Court further finds that the Iberville caused hangar and concrete damage to the hydrocushion. However, other than a brief inspection by the bridge tender immediately following the accident, Southern Pacific made no attempt to assess the damages before the next collision three days later.

5.

The M/V I. C. Hoskins, owned by the Arthur Smith Corporation, pushing two empty barges downriver on April 28, 1979, made contact with the hydrocushion near midnight and slid along it. The point of contact scratched 100' of the lead barge and 50' of the second one in a period of about one minute. Neither the boat captain nor the bridge tender noted any swing movement of the dolphin. The boat captain testified that the barges were scratched by a fixed overhead metal member of the hydrocushion which juts out past the concrete, which evidence is supported by the fact that the unloaded barges sat high on the water, with a 10.5' freeboard. The Court finds that the M/V I. C. Hoskins caused no structural damage to any part of the dolphin.

6.

The fourth and final accident in these consolidated actions occurred on May 3, 1979, at 8:52 p.m., when the M/V Marion Hagestad, a Canal Barge Company tug, pushing

two barges loaded with anhydrous ammonia, struck the dolphin at a northwest point on the hydrocushion. The captain of the Marion Hagestad managed to clear the barges but the middle of the tug hit the dolphin after an unsuccessful attempt to realign with the channel. The bridge tender on duty saw the dolphin moving back and forth upon impact, silhouetted in the lights from the vessel. His inspection revealed further hangar damage and a chip of concrete 4" x 8" x 6" fallen between the rubber bumpers on the dolphin.

7.

In January of 1979, the M/V National Goal and M/V Venture II caused substantial damage to the hangars when each collided with the dolphin. Southern Pacific contracted with Boh Bros. Construction Company to repair the damage for a total cost of $59,000.00 which work was performed on site and completed in mid-February, 1979. All defendants contend that these two incidents, combined with water movement and the impact of other collisions over the life of the dolphin, caused cumulative damage to the four joints in the concrete ring which had never been repaired and for which they should not be held accountable. The Court rejects this contention, and finds that the dolphin was in perfect working condition at the completion of the repairs, with neither residual structural damage nor weakened joints.

8.

In March of 1979, the dolphin suffered two more "brushes", by the M/V Ricohac and the M/V Eddie R. A

preponderance of the evidence established that neither of these two vessels caused any damage to the hydrocushion.

9.

David Fullerton, district claims adjuster for Southern Pacific, inspected the damage caused to the dolphin on April 9, following the Charles D incident, and on April 29, following that of the M/V I. C. Hoskins. Because the M/V I. C. Hoskins caused no damage to the hydrocushion, Mr. Fullerton's testimony and photographs were helpful to the Court in comparing the extent of damage caused the hydrocushion by the M/V Charles D and the M/V Iberville. The Court is convinced that the Charles D caused both joint and hangar damage, and that the Iberville aggravated the apparent damage.* Because a survey was not conducted, however, the Court does not know to what extent the structural integrity of the dolphin was impaired after the Charles D collision.

10.

On May 3, 1979, prior to the M/V Marion Hagestad collision, Mr. Fred Alley, engineer of bridge maintenance for Southern Pacific and the designer of the northeast hydrocushion, performed a walk-on inspection of the dolphin. At that time he determined that the dolphin had

*"Play" in the joints which can be detected when standing on the dolphin is an indication of how loose the joints are and how badly in need of repair. Testimony established that the play in the joints between the first and third collisions increased. Additionally, the M/V Iberville collision caused further bending and distortion of the hangars.

sustained serious joint and hangar damage and that the structure would have to be removed from the water to be satisfactorily repaired. Extensive joint damage was confirmed by an underwater inspection of the joints performed in June, 1979.

11.

Southern Pacific drew up plans and specifications for the reconditioning of joints and hangars and repair of damaged concrete, which called for the construction of two new concrete ring sections and repair of the four damaged sections, with the dolphin ultimately to have two new and two reparied sections, and two repaired sections to remain in storage. The plans provided that two sections at a time be removed to the bank and immediately replaced with two good sections, in order to minimize exposure to the railroad bridge. Bids were let and the low bid came in at a total cost of $324,400.00 from Boh Bros. Construction Company, which the evidence established was a reasonable price to perform the work specified.

12.

The plans called for betterments to the dolphin, by the addition of angles to the joint connections, revision of the hangar connection, and a new bumpering system. The total cost of the improvements was estimated by Boh Bros. at $52,200.00, which figure was included in the $324,400.00 bid and would have to be deducted from any recovery.

13.

Robert Wadhams, Registered Civil Engineer,

estimated the cost of reworking the dolphin by building four new concrete sections rather than two new ones as per plans and specifications, using the same figures Joe Timphony of Southern Pacific had used in estimating costs of labor, materials, equipment rentals, etc. His estimate of the repair work after deducting the cost of the betterments was $227,170.000.* The Court finds that Southern Pacific could have saved money by building four new concrete sections and would limit its claim to that amount.

14

The Court finds that the hydrocushion could have been inspected and surveyed for joint damage following the M/V Charles D collision. Militating against this conclusion is the testimony of Walter Blessey, who testifed that joint damage could only be determined by raising the hydrocushion out of the water. Joints run the length of the donut ring, and extent of separation from the concrete crucial to the integrity of the structure may occur below the waterline. Yet Southern Pacific's own experts admitted that a diving inspection to feel the extent of joint separation could be performed. And although the water may have

*This amount does not include the cost of removing the four old sections. Southern Pacific had figured the cost of repairing the two old sections at $7,500.00 each and the cost of removing two, alternatively, at $25,000.00. Since Southern Pacific would save defendants $10,000.00 by repairing two sections, it argues that it should recover this cost, as defendants would otherwise be liable for the higher cost of removing the sections. Since the Court finds that plaintiff had no intention of ever removing the sections from the Southern Pacific yard, it would not allow the cost of removal as a recoverable item of damage. Neither should defendants bear the cost of repairing old sections in addition to construction of new.

been too high and the current too swift to conduct an exterior underwater inspection of the hydrocushion in April, 1979, experts also testifed that an underwater inspection could have been successfully performed from the inside of the concrete ring, where divers would not have been hampered by the treacherous waters. The Court is not convinced, however, that an underwater inspection of the exterior joints of the hydrocushion could not have been made by hanging ladders over the top of the concrete ring for divers to climb down to make an inspection of the joints. (See Trial Exhibit SP 61-F). Finally, a walk-on inspection by an engineer such as the one conducted by Fred Alley on May 3, 1979, might have been performed and revealed the extent of joint deterioration after the Charles D. collision. If the joints had not begun to separate above the waterline,* such an inspection could well have been futile. If, on the other hand, the Charles D accident caused some joint separation above water, an engineer could have upon visual inspection made reasonable assumptions about the total extent of damage, upon which repair estimates could have been based.

15.

No estimates were taken nor surveys conducted for repair of concrete or hangar damage, nor for repair of joint damage, to the extent this could have been ascertained by walk-on or diving inspection, in the two and one-half week

*Testimony established that separation of the joints above the waterline would indicate the extent of separation and deterioration for the length of the hydrocushion, below the waterline.

period following the Charles D collision. Southern Pacific at all times retained control of its property, and did not contact D & G Boat Rentals to participate in a damage estimate of the dolphin. At no time in 1979, nor during the course of this trial did Southern Pacific attempt to ascertain or establish damages attributable to each defendant in these consolidated cases. This is not a case involving joint tortfeasors wherein the Court could award damages on a percentage basis. Southern Pacific knew that in the short life of the dolphin it had been struck many times by vessels and should have known that damage caused by D & G Boat Rentals was likely to be aggravated by another passing vessel losing control in the swift current of the Atchafalaya.

Conclusions of Law

1.

At trial, the Court dismissed the third party claim of Tidewater, Inc. against the United States, reserving its reasons. The Court concluded that the claim was invalid on two grounds.

2.

The U. S. Coast Guard was not at fault in the M/V Iberville incident. The evidence established that the captain of the Iberville failed to timely contact the VTS and that such failure, along with his failure to maintain control of the vessel and properly navigate the channel, were the legal causes of the accident.

3.

The claim against the United States was time-barred. Tidewater's claim against the United States is maintainable solely under 46 U.S.C. § 741, et seq., the Suits in Admiralty Act, *McCormick v. United States,* 680 F.2d 345 (5th Cir. 1982), which has a prescriptive period of two years. The Iberville collided with the dolphin on April 25, 1979, and Tidewater did not file its third party demand against the United States until more than two years later, June 29, 1981.

4.

Tidewater's contention that its demand against the United States is for contractual or tortious indemnity is without merit. The claim alleged, if proven, would be for contribution. The prescriptive period therefore began to run from the date of the accident and was tolled before Tidewater Venice filed its third party demand.* See, *United New York Sandy Hook Pilots' Association, et al v. United States of America,* 355 F.2d 189 (2nd Cir. 1965); *McAllister Lighterage Lines, Inc. v. Pennsylvania R. Co.,* 99 F.Supp. 648 (E.D.N.Y. 1951).

*Tidewater was not sued by Southern Pacific until more than two years after the date of the accident, and however inequitable it may be that their third party demand against the United States was extinguished before they were sued for damages to the hydrocushion, the two year period of limitations is jurisdictional. *T. J. Falgout Boats, Inc. v. United States,* 508 F.2d 855 (9th Cir. 1974). The two year statute of limitations cannot therefore be extended for equitable reasons.

5.

Southern Pacific's claim for damages against the Arthur Smith Corporation and the M/V I. C. Hoskins is not supported by the evidence and is dismissed.

6.

Southern Pacific has proved that it was damaged by the remaining three defendants, and that this damage was caused by each defendant's negligence in striking the dolphin. As concluded above in relation to the Charles D collision, the Court finds that the M/V Marion Hagestad and the M/V Iberville accidents could have been avoided by the exercise of reasonable care, and that Southern Pacific was not itself at fault in causing the accidents.

7.

The evidence is clear that after the Charles D collision two hangar bolts were in serious condition, and in the Court's opinion would have to be replaced. Although no estimate of this cost was made at that time the record is clear that as a result of the National Goal collision in January of 1979, the replacement of three (3) sheared hangar bolts along with the concrete work necessitated thereby cost $59,000.00. The Court feels that an award of $40,000.00 for the damage caused by the Charles D would be appropriate and will assess this amount against D & G Boat Rentals and the Charles D. Although additional damage was probably caused by the Charles D collision the evidence does not support any additional award.

8.

The M/V Iberville knocked a chip of concrete off the dolphin approximately nine feet wide, substantially larger than that chipped by the M/V Marion Hagestad which was proved to cost $800.00 to repair. Allen Lohrmand, Southern Pacific bridge and building supervisor in 1979, testified that the Iberville damaged the hydrocushion in the amount of $4,000.00. The Court will allow an award of $2,000.00 against Tidewater Venice, Inc. and the M/V Iberville. Again, although the Court feels that some joint and hangar damage was proved against the M/V Iberville, there is no evidence in the record to support an award therefor.

9.

Canal Barge Company is liable to Southern Pacific for repair of concrete damage caused to the dolphin by its vessel, the M/V Marion Hagestad, in the amount of $800.00. No joint or hangar damage to the hydrocushion was proved against Canal Barge Company. Indeed, evidence established that the joints and hangars were already inoperative by the time the Marion Hagestad hit the dolphin on May 3, 1979, which relieves Canal Barge Company of any liability for the structural damage.

10.

The hydrocushion was structurally sound and in perfect repair when the Charles D. hit it, and by the time Fred Alley inspected it on May 3, 1979, after two subsequent collisions it had sustained severe damage

necessitating repair in the amount of $227,170.00. Although the Court concludes that this damage was caused by the M/V Charles D and M/V Iberville collisions, there is no evidence to support an equal or unequal apportionment of damages between the two defendents.

11.

It is a fundamental principle of tort law that a plaintiff should be compensated for injury caused by a negligent wrongdoer. Equally compelling however is the principle that a defendant's liability should be limited to that part of plaintiff's harm which he has in fact caused. The plaintiff ultimately has the burden of proving not only that he was damaged by a negligent defendant, but also the amount of the damage proximately caused by the negligent act. *Sweet Milk v. Stanfield,* 353 F.2d 811 (9th Cir. 1965). Although a plaintiff need not demonstrate the amount of damages with mathematical precision, he must at least provide sufficient evidence to take the amount being claimed out of the realm of speculation and conjecture. *Cordeco Development Corp. v. Santiago Vasquez,* 539 F.2d 256 (1st Cir. 1976).

12.

Plaintiff has proved its total damages and fault of two parties and cities *United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975) in support of its argument that the Court should allocate liability among the parties proportionately to the comparative degree of their fault. Plaintiff's reliance on *Reliable Transfer,* however, where the Court apportioned damages between tortfeasors in an

incident involving mutual fault, is misplaced. The case herein involved four separate incidents consolidated for trial purposes only, and it would constitute error to conclude that the remaining defendants are mutually bound to plaintiff for a single wrong. Southern Pacific must still prove its damages as to each defendant for each separate and separable incident.

13.

Plaintiff next cites *Botazzi v. Petroleum Helicopters, Inc., et al,* 644 F.2d 49 (5th Cir. 1982) in support of its contention that where more than one defendant's acts combine to cause harm, the burden shifts to each to show what portion he caused, failing which, each is jointly and severally liable for the total damages. *Botazzi* is also inapposite. The case involved two separate helicopter accidents causing severe psychological damage to a single plaintiff.* The Court found that it was impossible to ascertain the psychological damage caused plaintiff by each accident, and divided damages equally between the two defendants. The Court feels that an equal division of damages here would be inappropriate, as, unlike the situation in *Botazzi,* the damages herein might have been reasonably ascertained by a marine survey or other type inspection following the Charles D. collision.

*Plaintiff brought suit against the two different defendants separately and the two suits were consolidated for trial.

14.

Other multicollision cases cited by plaintiff, where the burden of proof was shifted to defendants to segregate the damages caused to plaintiff, or where the Court allowed an imprecise apportionment of damages based on reasonable estimates, are inapplicable. *Daniels Towing Service, Inc. v. Nat Harrison Associates,* 432 F.2d 102 (5th Cir. 1970), *Moran Towing Corp. v. M. A. Gammino Construction Company,* 363 F.2d 113 (st Cir. 1966), 409 F.2d 917 (1st Cir. 1969), *Huddell v. Levin,* 537 F.2d 726 (3rd Cir. 1976). This is not a case wherein the Court is forced to apportion damages between a negligent plaintiff and a negligent defendant, nor is it a case involving the apportionment of damages between solidarily bound tortfeasors. These are four cases consolidated for the convenience of the parties and the Court. Absent circumstances which would justify a shift of the burden of proof or facts to support an imprecise apportionment, each defendant is liable only for the damage proved against it. Plaintiff has not proven to the satisfaction of the Court that damages could not have been ascertained nor a reasonable estimate of damages taken in the seventeen-day-period following the Charles D. incident. The underlying rationale of all cases cited by plaintiff is to allow an injured plaintiff to recover from negligent wrongdoers where the plaintiff cannot reasonably apportion damages between them, nor ascertain with precision the damage caused by multiple parties.

15.

A walk-on inspection after the Charles D collision might have revealed severe separation of the joints above

the water, which experts established would indicate joint separation under the water as well. A visual inspection might have indicated joint damage but that major repair was not yet necessary, or that the structural integrity of the hydrocushion was not endangered at all by the Charles D collision. A diving inspection conducted from the inside of the concrete ring might have established that the Charles D caused damage that could not be estimated without removing the hydrocushion from the water, which the railroad company may have reasonably refused to do when the waters were high and the current dangerous.

16.

The Court does not know if the damages were ascertainable or not after the Charles D collision. It may well have been that the damages could not have been reasonably determined at that time. What the Court does know, however, it that in at least one instance, when Mr. Fred Alley inspected the dolphin on May 3, 1979, the damages were ascertainable and were ascertained when Mr. Alley determined that replacement of joints was necessary to preserve the structural integrity of the dolphin.

17

The Court concludes that the plaintiff has not met its initial burden of proving that the damages were incapable of apportionment between the M/V Charles D and the M/V Iberville. Under the facts of this case, the law does not allow plaintiff the luxury of a shift to defendants of the burden of proving damages caused by each, nor the Court

the ease of dividing damages between the two defendants. Southern Pacific knew that collisions with the dolphin system were frequent. More importantly, Southern Pacific retained control of its property and neglected to attempt an assessment of damages unitl after two unfortunate accidents later. At this point it was impossible to determine which vessel caused what damage. Although it is unfair to a damaged plaintiff to remain uncompensated, it would be equally unfair for a defendant who caused very little damage to be cast for major repair, in a case such as this where damages might have been ascertained by the plaintiff prior to a subsequent wrong.

18.

Accordingly, the Court will award judgment herein in favor of Southern Pacific Transportation Company and against M/V Charles D, et al, in the amount of FORTY THOUSAND AND NO/100 ($40,000.00) DOLLARS against M/V Iberville, et al, in the amount of TWO THOUSAND AND NO/100 ($2,000.00) DOLLARS, and against M/V Marian Hagestad, et al, in the amount of EIGHT HUNDRED AND NO/100 ($800.00) DOLLARS, as these damages could be segregated and allocated to each of the responsible parties.

19.

The Court will allow an award of prejudgment interest of 9.07% from date of each respective accident against the M/V Charles D, the M/V Iberville and the M/V Marian Hagestad. The Court has not found "peculiar cir-

cumstances" which would justify a denial of prejudgment interest or make it inequitable for the defendants to be forced to pay it. *Pluyer v. Mitsui, supra; Ceja v. Mike Hooks, Inc., supra.*

Opelousas, Louisiana, December 8, 1982.

/S/ JOHN M. SHAW

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION
SECTION S

Filed Dec 8 1982

HARCON BARGE COMPANY, INC.
VS. CIVIL ACTION NUMBER
D&G BOAT RENTALS, INC. 791592

SOUTHERN PACIFIC TRANSPORTATION CO.
VS. CIVIL ACTION NUMBER
M/V I. C. HOSKINS, ET AL 800511

SOUTHERN TRANSPORTATION CO.
VS. CIVIL ACTION NUMBER
M/V IBERVILLE, ET AL 800512

SOUTHERN PACIFIC TRANSPORTATION CO.
VS. CIVIL ACTION NUMBER
M/V CHARLES D, ET AL 800513

SOUTHERN PACIFIC TRANSPORTATION CO.
VS. CIVIL ACTION NUMBER
M/V MARIAN HAGESTAD, ET AL 800514

JUDGMENT

These consolidated cases came on for trial before the Court, District Judge John M. Shaw presiding. After hearing the law and the evidence presented, and in accordance with the Findings of Fact and Conclusions of Law filed herewith,

It is ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Harcon Barge Company, and against defendant, Southern Pacific Transportation Company, in the amount of $21,629.68, with 9.07% interest from April 9, 1979, until paid, Southern Pacific to bear costs.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, M/V I. C. Hoskins and the Arthur Smith Corporation, dismissing the claims of Southern Pacific Transportation Company against them, Southern Pacific to bear costs.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation Company, and against M/V Iberville and Tidewater Venice, Inc., in the amount of TWO THOUSAND AND NO/100 ($2,000.00) DOLLARS, with 9.07% interest from April 25, 1979, until paid, and in favor of the United States of America, dismissing the third party demand of defendants, M/V Iberville and Tidewater Venice, Inc. to bear costs.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation Company, and agaiinst M/V Charles D and D&G Boat Rentals in the amount of FORTY THOUSAND AND NO/100 ($40,000.00) DOLLARS, wiith 9.07% interest from April 25, 1979, until paid, defendants, M/V Charles D and D&G Boat Rentals, to bear costs.

It is further ORDERED, ADJEDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation Company, and against M/V Marian Hagestad and Canal Barge Company, in the amount of EIGHT HUNDRED AND NO/100 ($800.00) DOLLARS, with 9.07% interest from April 25, 1979, until paid, defendants, M/V Marian Hagestad and Canal Barge Company to bear costs.

Opelousas, Louisiana, December 8, 1982.

/s/

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that three copies of the Supplemental Appendices have been served upon all counsel of record:

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by depositing copies of the same in the United States Mail, postage prepaid, this 17 day of June, 1986.

Lawrence J Ernst

Lawrence J. Ernst